Tenaga Nasional Bhd v Ichi-Ban Plastic (M) Sdn Bhd and other appeals

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NOS 02(f)-20–03 OF 2015 (P), 02(f)-63–10 OF 2015 (W), 02(f)-64–10 OF 2015 (W), 02(f)-71–10 OF 2015 (W), 02(f)-83–11 OF 2015 (B) AND 02(f)-86–11 OF 2015 (P)

AHMAD MAAROP CJ (MALAYA), HASAN LAH, ABU SAMAH NORDIN, AZAHAR MOHAMED AND AZIAH ALI FCJJ

30 JANUARY 2018

Utilities — Electricity — Tampering of meter — Whether consumer must first be convicted for meter-tampering before loss of revenue could recovered — Legal effect of written statement for recovery of loss of revenue — Whether estimation or approximation of loss of revenue suffered by electricity supplier as result of tampered meter precluded under claim — Whether consumer enjoyed unjust benefit — Whether estoppel arose to nullify claim — Electricity Supply Act 1990 s 38(3) & (4)

This case concerned six appeals and they were heard together. These appeals are: (a) *Tenaga Nasional Bhd v Ichi-Ban Plastic (M) Sdn Bhd*; (b) *Bright Rims Manufacturing Sdn Bhd v Tenaga Nasional Bhd*; (c) *AWP Enterprise Sdn Bhd v Tenaga Nasional Bhd*; (d) *Tenaga Nasional Bhd v Nikmat Maju Development Sdn Bhd*; (e) *Tenaga Nasional Bhd v Dunia Raya Enterprise Sdn Bhd*; and (f) *Kepala Batas Bihun Sdn Bhd v Tenaga Nasional Bhd*. There were several questions of laws in these appeals which gave rise to common issues. The common issues that arose for the court's adjudication were: (i) whether a consumer must first be convicted for meter-tampering before Tenaga Nasional Bhd ('TNB') could recover the loss of revenue under s 38(3) and (4) of the Electricity Supply Act 1990 ('the Act'); (ii) the legal effect of the written statement from TNB under s 38(4) of the Act for purposes of recovery of the loss of revenue; (iii) whether an estimation or approximation of the loss of revenue suffered by TNB as a result of a tampered meter at the consumer's premises is precluded under s 38 claim; (iv) whether the rationale behind s 38 of the Act enabling TNB to recover the unrecorded consumption of electricity by the consumer due to a tampered meter is the unjust benefit enjoyed by the consumer; and (v) whether estoppel arising from delay applies to nullify a s 38 claim.

Held:

(1) TNB's right to claim its loss of revenue was under s 38(3) and not s 38(4) of the Act. Section 38(4) is a provision relating to the mode of proof

where TNB makes a claim for loss of revenue under s 38(3) of the Act. A written statement by an employee duly certified by TNB or by person authorised by TNB stating: (a) the amount of loss of revenue or the expenses incurred by TNB; and (b) the person liable for the payment, shall be prima facie evidence of the payment that has to be made by the consumer under s 38(3) of the Act. A criminal conviction of an offence under s 37(1), (3) or (14) of the Act is not a pre-condition for TNB to pursue its claims for loss of revenue under s 38(3) of the Act. This right is a separate right independent of its right to disconnect the supply of electricity under s 38(1) of the Act (see para 33).

(2) The written statement issued by TNB must satisfy the first five conditions under s 38(4) of the Act in order for it to be accepted as a prima facie evidence of the payment that has to be made by the consumer. In cases where written statement was not issued in compliance with s 38(4) of the Act, TNB loses advantage of the presumption of a prima facie evidence but it does not lose the right of recovery given statutorily under s 38(3) of the Act. However, TNB has to prove its claim based on the civil burden and the standard of proof of balance of probabilities (see paras 65–66).

(3) Where precise evidence is available, if there is a special device to measure the loss of revenue due to the tampering of electricity supply, naturally the court expects to have it, but where it is not, the court must do the best it can. In other words, there could be other evidence in lieu of precise evidence. For example, approximation or estimation may be used provided it is reasonable and fair. This would depend on the quality of the evidence adduced to support that approximation or estimation (see para 86).

(4) As an alternative or in addition to the statutory cause of action under s 38(3) of the Act for recovery for loss of revenue, TNB is entitled to legally pursue the claim based on a cause of action in unjust enrichment. If TNB elects to pursue relief for unjust enrichment then, there must be a proper and specific plea in the statement of claim that its cause of action is so founded. Further, material particulars that give rise to unjust enrichment must be provided in the pleadings. In this regard, the court should not decide on an issue that was not pleaded by the parties. Parties are required to set out the factual bases of their respective cases in the pleadings. The most important purpose of pleadings is to plead reasonable cause of action, define the issues of fact and questions of law to be determined by the court. Pleadings enable both parties to know in advance the averments being made against them so that they will not be taken by surprise during the trial. In the present appeals TNB did not plead that its cause of action was founded on the law of unjust

A enrichment. Unjust benefit was not a pleaded issue. The submission on the benefit/unjust enrichment was misconceived (see para 96).

[Bahasa Malaysia summary

Kes ini adalah berkenaan enam rayuan dan kesemuanya dibicarakan bersekali. B Enam rayuan ini adalah: (a) *Tenaga Nasional Bhd v Ichi-Ban Plastic (M) Sdn Bhd*; (b) *Bright Rims Manufacturing Sdn Bhd v Tenaga Nasional Bhd*; (c) *AWP Enterprise Sdn Bhd v Tenaga Nasional Bhd*; (d) *Tenaga Nasional Bhd v Nikmat Maju Development Sdn Bhd*; (e) *Tenaga Nasional Bhd v Dunia Raya Enterprise Sdn Bhd*; dan (f) *Kepala Batas Bihun Sdn Bhd v Tenaga Nasional Bhd*. Terdapat C beberapa soalan undang-undang dalam rayuan-rayuan ini yang membangkitkan isu-isu yang sama. Isu-isu sama yang berbangkit bagi pemutusan mahkamah adalah: (i) sama ada pengguna mestilah, terlebih dahulu, disabitkan bagi usikan meter sebelum Tenaga Nasional Bhd ('TNB') boleh memperoleh semula kerugian hasil di bawah s 38(3) dan (4) Akta D Bekalan Elektrik 1990 ('Akta'); (ii) kesan undang-undang pernyataan bertulis daripada TNB di bawah s 38(4) Akta bagi tujuan pemerolehan semula kerugian hasil; (iii) sama ada anggaran atau penghampiran kerugian hasil yang dialami oleh TNB akibat usikan meter pada premis pengguna terkecuali daripada tuntutan s 38; (iv) sama ada rasional sebalik s 38 Akta yang E membolehkan pemerolehan semula pengguna elektrik yang tidak tercatat oleh pengguna akibat usikan meter adalah manfaat tidak patut yang dinikmati oleh pengguna; dan (v) sama ada estopel yang berbangkit susulan kelewatan terpakai untuk membatalkan satu tuntutan s 38.

F **Diputuskan:**

(1) Hak TNB menuntut kerugian terletak dalam s 38(3) dan bukan s 38(4) Akta. Seksyen 38(4) adalah peruntukan berkenaan cara pembuktian iaitu TNB membuat tuntutan bagi kerugian hasil bawah s 38(3) Akta. G Pernyataan bertulis oleh seorang pekerja yang disahkan oleh TNB atau orang yang diberi kuasa oleh TNB yang menyatakan: (a) jumlah kerugian hasil atau perbelanjaan yang dikeluarkan oleh TNB; dan (b) orang yang perlu membayar, adalah keterangan prima facie bayaran yang harus dibuat kepada pengguna di bawah s 38(3) Akta. Satu sabitan H jenayah atas kesalahan bawah s 37(1), (3) atau (14) Akta bukan pra-syarat untuk TNB memulakan tuntutannya bagi kerugian hasil di bawah s 38(3) Akta. Hak ini adalah hak asing yang bebas daripada haknya untuk memutuskan bekalan elektrik di bawah s 38(1) Akta (lihat perenggan 33).

I (2) Pernyataan bertulis yang dikeluarkan oleh TNB mesti memenuhi kelima-lima syarat pertama di bawah s 38(4) Akta untuk diterima sebagai keterangan prima facie bayaran yang perlu dibuat oleh pengguna. Dalam kes-kes pernyataan bertulis tidak dikeluarkan selaras dengan s 38(4) Akta, TNB hilang manfaat anggapan keterangan prima facie tetapi tidak

hilang hak pemulangan yang diberi di bawah statutori menurut s 38(3) Akta. Walau bagaimanapun, TNB perlu membuktikan tuntutannya berdasarkan beban sivil dan standard pembuktian atas imbangan kebarangkalian (lihat perenggan 65–66).

(3) Apabila keterangan tetap sudah ada, iaitu jika terdapat alat khas untuk mentaksir kerugian hasil akibat usikan bekalan elektrik, mahkamah biasanya menjangka untuk mendapatkannya tetapi jika tidak, mahkamah mestilah membuat yang terbaik sedayanya. Dalam erti kata lain, mungkin terdapat lain-lain keterangan sebagai ganti keterangan tepat. Contohnya, anggaran atau penghamporan boleh digunakan asalkan ini adil dan munasabah. Ini akan bergantung pada kualiti keterangan yang dikemukakan untuk menyokong anggaran atau penghampiran (lihat perenggan 86).

(4) Sebagai alternatif atau sebagai tambahan pada kausa tindakan statutori di bawah s 38(3) Akta bagi pemerolehan kerugian hasil, TNB berhak menerukan tuntutan bawah undang-undang berdasarkan kausa tindakan dalam pengkayaan tidak patut. Jika TNB memilih untuk meneruskan relif pengkayaan tidak patut, mesti terdapat pli khusus dalam pernyataan tuntutan bahawa kausa tindakan ini berasas. Selanjutnya, butir-butir penting yang membangkitkan pengkayaan tidak patut mestilah diperuntukkan dalam pliding. Dalam hal keadaan ini, mahkamah tidak patut memutuskan berdasarkan isu yang tidak diplidkan oleh pihak-pihak. Pihak-pihak perlu membentangkan asas-asas fakta dalam kes masing-masing dalam pliding. Tujuan utama pliding adalah memplidkan kausa tindakan munasabah, memperihalkan isu-isu fakta dan soalan-soalan undang-undang yang perlu diputuskan oleh mahkamah. Pliding membolehkan kedua-dua pihak mengetahui terlebih dahulu hujah-hujah yang dibuat terhadap mereka agar mereka tidak terkejut ketika perbicaraan. Dalam rayuan-rayuan ini, TNB tidak memplidkan kausa tindakan berdasarkan undang-undang pengkayaan tidak patut. Manfaat tidak patut bukan isu yang diplidkan. Hujahan manfaat/pengkayaan tidak patut adalah satu salah tanggapan (lihat perenggan 96).]

Cases referred to

Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (1920) 28 CLR 129, HC (refd)

Biggin & Co Ld and another v Permanite, Ld, Berry Wiggins & Co Ld (third parties) [1951] 1 KB 422, KBD (refd)

Chaplin v Hicks [1911] 2 KB 786, CA (refd)

Claybricks & Tiles Sdn Bhd lwn Tenaga Nasional Bhd [2007] 1 MLJ 217; [2006] 4 CLJ 892, CA (refd)

Dai-Ichi Electronics (M) Sdn Bhd v Tenaga Nasional Bhd [1996] 4 MLJ 506, HC (refd)

A *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441; [2015] 2 CLJ 453, FC (refd)
Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd [1942] 2 All ER 122, HL (refd)
Francis Phillips a/l AJ Phillips v Bank Industri Malaysia Bhd [2004] 2 MLJ 1,
B CA (refd)
Goh Guan Seng (t/a MSG Ice Enterprise) v Tenaga Nasional Bhd [2012] MLJU 1400, HC (refd)
Government of Malaysia v Lim Kit Siang; United Engineers (M) Berhad v Lim Kit Siang [1988] 2 MLJ 12, SC (refd)
C *Guan Soon Tin Mining Co v Wong Fook Kum* [1969] 1 MLJ 99, FC (refd)
Ichi-Ban Plastic (M) Sdn Bhd v Tenaga Nasional Bhd [2014] 6 MLJ 461, CA (refd)
Kok Hoong v Leong Cheong Kweng Mines Ltd [1964] 1 MLJ 49; [1963] 1 LNS 61, PC (refd)
D *Leong Hup Poultry Sdn Bhd v Tenaga Nasional Bhd* (Muar High Court Civil Suit No 22–11 of 1999) (unreported), HC (refd)
Letang v Cooper [1965] 1 QB 232, CA (refd)
Maritime Electric Co Ltd v General Dairies Ltd [1937] 1 All ER 748; [1937] AC 610, PC (refd)
E *Marwin Industries Sdn Bhd v TNB* (Civil Appeal No J-02(NCVC)-3147–12 of 2011) (unreported), CA (refd)
Metramac Corp Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd [2006] 4 MLJ 113, FC (refd)
Nikmat Maju Development Sdn Bhd v Tenaga Nasional Bhd [2015] 4 MLJ 502,
F CA (refd)
Ong Ah Long v Dr S Underwood [1983] 2 MLJ 324; [1983] CLJ Rep 300, FC (refd)
Public Textiles Berhad v Lembaga Letrik Negara [1976] 2 MLJ 58; [1976] 1 LNS 120, FC (folld)
G *Sabah Electricity Sdn Bhd v Idah Bakar* [2014] MLJU 1902; [2014] 1 LNS 1444, HC (refd)
Saiman bin Umar v Lembaga Pertubuhan Peladang and another appeal [2015] 6 MLJ 492, FC (refd)
Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy [1995] 1 MLJ 817, FC
H (refd)
Sumbang Projeks Sdn Bhd v Tenaga Nasional Berhad [2014] MLJU 1813; [2014] 4 CLJ 323, CA (refd)
Syarikat Kemajuan Timbermine Sdn Bhd v Kerajaan Negeri Kelantan Darul Naim [2015] 3 MLJ 609; [2015] 2 CLJ 1037, FC (refd)
I *Tenaga Nasional Berhad lwn Rank Metal Sdn Bhd dan satu kes lagi* [2014] MLJU 1837; [2014] 1 LNS 1776, HC (refd)
Tenaga Nasional Bhd lwn Arkitek Urbanisma Sdn Bhd [2010] MLJU 2219; [2011] 10 CLJ 796, HC (refd)
Taiwan Chief Precision Technology Sdn Bhd (formerly known as Li Yo Electronics

Sdn Bhd) v Tenaga Nasional Bhd [2013] 4 MLJ 625; [2014] 4 CLJ 23, CA (refd)
Tan Yeong Kim v Tenaga Nasional Berhad [2000] MLJU 447; [2000] 8 CLJ 629, HC (refd)
Tenaga Nasional Berhad (dahulunya Lembaga Letrik Negara Tanah Melayu) v Star Polymer Sdn Bhd (dahulunya Luen Mei Plastic Industries Sdn Bhd) [2004] MLJU 146; [2004] 1 LNS 124, HC (refd)
Tenaga Nasional Berhad v Dunia Raya Enterprise Sdn Bhd [2015] MLJU 2140; [2015] 6 CLJ 751, CA (refd)
Tenaga Nasional Berhad v Chew Soy [2014] MLJU 1901; [2014] 1 LNS 374, HC (refd)
Tenaga Nasional Bhd v Ee-Lian Plastic Industries (M) Sdn Bhd [2013] 8 MLJ 683; [2013] 2 CLJ 697, HC (refd)
Tenaga Nasional Bhd v Empayar Canggih Sdn Bhd (previously known as ODVD Manufacturer Sdn Bhd) [2014] 8 MLJ 280, HC (refd)
Tenaga Nasional Bhd v JCY HDD Technology Sdn Bhd [2012] 3 MLJ 705, HC (refd)
Tenaga Nasional Bhd v Takatronics (M) Sdn Bhd & Ors [2010] MLJU 1727; [2010] 1 LNS 1559, HC (refd)
Tenaga Nasional Berhad v Ternakan Air Wui Kyee Sdn Bhd [2015] MLJU 2136; [2015] 5 CLJ 955, CA (refd)
Terengganu Forest Products Sdn Bhd v Cosco Container Lines Co Ltd & Anor and other applications [2011] 1 MLJ 25, FC (folld)
WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd [2012] 4 MLJ 296; [2012] 4 CLJ 478, FC (refd)
Zabihi v Janzemini and others [2009] All ER (D) 357 (Jul); [2009] EWCA Civ 851, CA (refd)

Legislation referred to

Electricity Act 1949 (repealed by the Electricity Supply Act 1990)
Electricity Supply Act 1990 ss 2, 32(1), (2), (3), 37, 37(1), (3), (14), 38, 38(1), (3), (4), (5), 39(4), 42, Part IX
Licensee Supply Regulations 1990 reg 3(1)
Rules of the High Court 1980 O 53

Cyrus Das (Steven Thiru, David Mathew and Hadi Mukhlis with him) (Idris & Assoc) in Civil Appeal No 02(f)-20–03 of 2015 (P) for the appellant.
Cyrus Das (Steven Thiru, David Mathew and Hadi Mukhlis with him) (Che Mokhtar & Ling) in Civil Appeal Nos 02(f)-63–10 of 2015 (W) and 02(f)-71–10 of 2015 for the appellant.
Ram Karpal Singh (Harshan Mohd Zamani with him) (Karpal Singh & Co) in Civil Appeal No 02(f)-64–10 of 2015 (W) for the appellant.
Cyrus Das (Steven Thiru, David Mathew, Hadi Mukhlis, Alvin John and Mohd Rizal bin Yaakub with him) (Alvin John & Partners) in Civil Appeal No 02(f)-83–11 of 2015 (B) for the appellant.

Ang Khoon Cheong (CP Ang & Co) in Civil Appeal No 02(f)-86–11 of 2015 (P) for the appellant.
Gideon Tan (Yap Yoon Jan with him) (Gideon Tan Razali Zaini) in Civil Appeal No 02(f)-20–03 of 2015 (P) for the respondent.
Ram Karpal Singh (Harshan Mohd Zamani with him) (Karpal Singh & Co) in Civil Appeal No 02(f)-63–10 of 2015 (W) for the respondent.
Cyrus Das (Steven Thiru, David Mathew and Hadi Mukhlis with him) (Che Mokhtar & Ling) in Civil Appeal No 02(f)-64–10 of 2015 (W) for the respondent.
Chan Wei June (K Lopez and Mazuhairie Ifwat with him) (Kamarudin & Partners) in Civil Appeal No 02(f)-71–10 of 2015 (W) for the respondent.
Gideon Tan (Yap Yoon Jan, Lye Wing Voi and Yap Hsu-Lyn with him) (WV Lye & Partners) in Civil Appeal No 02(f)-83–11 of 2015 (B) for the respondent.
Cyrus Das (Steven Thiru, David Mathew and Hadi Mukhlis with him) (Shook Lin & Bok) in Civil Appeal No 02(f)-86–11 of 2015 (P) for the respondent.

Ahmad Maarop CJ (Malaya), Hasan Lah, Abu Samah Nordin, Azahar Mohamed and Aziah Ali FCJJ:

[1] This case concerns the following appeals:

(a) Civil Appeal No 02(f)-20–03 of 2015 (P) (*Tenaga Nasional Bhd v Ichi-Ban Plastic (M) Sdn Bhd*);

(b) Civil Appeal No 02(f)-63–10 of 2015(W) (*Bright Rims Manufacturing Sdn Bhd v Tenaga Nasional Bhd*);

(c) Civil Appeal No 02(f)-64–10 of 2015(W) (*AWP Enterprise (M) Sdn Bhd v Tenaga Nasional Bhd*);

(d) Civil Appeal No 02(f)-71–10 of 2015(W) (*Tenaga Nasional Bhd v Nikmat Maju Development Sdn Bhd*);

(e) Civil Appeal No 02(f)-83–11 of 2015(B) (*Tenaga Nasional Bhd v Dunia Raya Enterprise Sdn Bhd*); and

(f) Civil Appeal No 02(f)-86–11 of 2015(P) (*Kepala Batas Bihun Sdn Bhd v Tenaga Nasional Bhd*).

[2] This court had directed all the six appeals to be heard together. Parties will be referred to by their names. Tenaga Nasional Bhd ('TNB') are appellants in three of the appeals and respondent in the other three.

[3] There are several of question of laws in these appeals which give rise to common issues. Therefore at the outset of the proceeding we adopted the approach applied in *Terengganu Forest Products Sdn Bhd v Cosco Container Lines Co Ltd & Anor and other applications* [2011] 1 MLJ 25. We decided to hear and

consider the common issues of law. Our decision on these issues of law would then be made applicable to the respective appeals for disposal. In other words, once these issues are decided upon, parties will then revert to argue on the substantial merit of their respective appeals. Therefore at this stage the facts of the respective appeals are not relevant (see per Zaki Azmi Chief Justice in *Terengganu Forest* at p 32).

[4] The leave questions in respect of which applications for leave to appeal were allowed in the six appeals may collectively be grouped into the following issues:

(a) whether a consumer must first be convicted for meter tampering before TNB could recover the loss of revenue under s 38(3) and (4) of the Electricity Supply Act 1990 ('the Act'): *the prior conviction point*;

(b) the legal effect of the written statement from TNB under s 38(4) of the Act for purposes of recovery of the loss of revenue: *the written statement point*;

(c) whether an estimation or approximation of the loss of revenue suffered by TNB as a result of a tampered meter at the consumer's premises is precluded under a s 38 claim: *the calculation point*;

(d) whether the rationale behind s 38 of the Act enabling TNB to recover the unrecorded consumption of electricity by the consumer due to a tampered meter is the unjust benefit enjoyed by the consumer: *the benefit/unjust enrichment point*; and

(e) whether estoppel arising from delay applies to nullify a s 38 claim: *the estoppel point*.

[5] We will consider these points in turn.

THE PRIOR CONVICTION POINT

[6] AWP Enterprise Sdn Bhd is one of the appellants. On 21 February 2011 the Kuala Lumpur High Court dismissed TNB's claims of RM443,598.77 and interest against the appellant for loss of revenue from the supply of electricity to AWP Enterprise Sdn Bhd due to alleged meter tempering. AWP Enterprise denied tempering with the meter.

[7] On appeal by TNB, the Court of Appeal set aside the judgment of the High Court and allowed TNB's claim for the sum of RM443,598.77 with interest thereon at 8%pa from the date of judgment until full realisation.

[8] On 9 September 2015 this court granted the appellant leave to appeal against the decision of the Court of Appeal on five questions of law, inclusive of the following questions of law:

(a) whether the respondent is obliged to obtain a criminal conviction against the applicant before it can claim its losses from the applicant under s 38(4) of the Act despite the respondent having disconnected the supply of electricity to the appellant pursuant to s 38(1) of the said Act; and

(b) Whether s 38(3) and (4) of the said Act have to be independently proved by way of a criminal conviction before the respondent can claim its losses against the applicant despite the respondent having availed itself of s 38(1) of the said Act?

[9] For convenience, s 38 of the Act states:

38(1) Where any person employed by a licensee finds upon any premises evidence which in his opinion proves that an offence has been committed under subsection 37(1), (3) or (14), the licensee or any person duly authorized by the licensee may, upon giving not less than twenty-four hours' notice, in such form as may be prescribed, cause the supply of electricity to be disconnected from the said premises.

(1A) Notwithstanding any other provisions in this Act, where a police officer not below the rank of Assistant Superintendent applies to a supply authority or a licensee for the disconnection of the supply of electricity to any premises for a period not exceeding one calendar month under section 21A of the Common Gaming Houses Act 1953 [Act 289], the supply authority or the licensee or any person authorized by the supply authority or the licensee shall immediately disconnect or cause the supply of electricity to be disconnected from those premises.

(2) If the supply of electricity has been disconnected under subsection (1), it shall not be reconnected until the licensee at his discretion gives permission for reconnection:

Provided that the period of disconnection shall not exceed three months.

(2A) Notwithstanding subsection (2), if the supply of electricity has been disconnected under subsection (1A), it shall not be reconnected without the written permission of a police officer not below the rank of Assistant Superintendent.

(3) The licensee may require the consumer to pay him for the loss of revenue due to the offence committed under subsections 37(1), (3) and (14) and any expenses incurred by the licensee under this section including expenses incurred in respect of the reconnection of electricity supply.

(4) A written statement by an employee of the licensee duly certified by the licensee or any person authorized by the licensee specifying —

(a) the amount of loss of revenue or the expenses incurred by the licensee; and

(b) the person liable for the payment thereof,

shall be prima facie evidence of the payment that has to be made by the consumer under subsection (3).

(5) The amount stated in the written statement shall, within the period specified in the statement, be due and payable to the licensee and in default of payment such amount shall be recoverable by civil action in a court.

[10] At a glance, it appears that s 38 of the Act is not entirely difficult to comprehend and poses no problem of interpretation. In practice, it has caused much confusion and misunderstanding between the licensee, that is, TNB and the consumers. Judicial opinion on the proper construction of s 38 of the Act had been sharply divided. There is no consensus on the true meaning of s 38 of the Act among the judges of the High Courts. There are apparently two opposing views.

[11] The first view is that TNB must first obtain a criminal conviction against the consumer of an offence under s 37(1), (3) or (14) of the Act before it can pursue its claims for loss of revenue against the consumer in respect of consumption of electricity, as was decided by the High Court in the following cases:

(a) *Dai-Ichi Electronics (M) Sdn Bhd v Tenaga Nasional Bhd* [1996] 4 MLJ 506;

(b) *Tenaga Nasional Berhad (dahulunya Lembaga Letrik Negara Tanah Melayu) v Star Polymer Sdn Bhd (dahulunya Luen Mei Plastic Industries Sdn Bhd)* [2004] MLJU 146; [2004] 1 LNS 124;

(c) *Tenaga Nasional Bhd v Takatronics (M) Sdn Bhd & Ors* [2010] MLJU 1727; [2010] 1 LNS 1559;

(d) *Tenaga Nasional Bhd v Ee-Lian Plastic Industries (M) Sdn Bhd* [2013] 8 MLJ 683; [2013] 2 CLJ 697; and

(e) *Tenaga Nasional Bhd v JCY HDD Technology Sdn Bhd* [2012] 3 MLJ 705.

[12] The other view is that criminal conviction of an offence under s 37(1), (3) or (14) of the Act is not a precondition for TNB to pursue its claims against the consumer for loss of revenue, as was held by the High Court and Court of Appeal in the following cases:

(a) High Court:

(i) *Leong Hup Poultry Sdn Bhd v Tenaga Nasional Bhd* (Muar High Court Civil Suit No 22–11 of 1999) (unreported);

(ii) *Tan Yeong Kim v Tenaga Nasional Berhad* [2000] MLJU 447; [2000] 8 CLJ 629;

A (iii) *Goh Guan Seng (t/a MSG Ice Enterprise) v Tenaga Nasional Bhd* [2012] MLJU 1400;

(iv) *Tenaga Nasional Bhd v Empayar Canggih Sdn Bhd (previously known as ODVD Manufacturer Sdn Bhd)* [2014] 8 MLJ 280; and

B (v) *Tenaga Nasional Berhad v Chew Soy* [2014] MLJU 1901; [2014] 1 LNS 374;

(b) Court of Appeal:

C (i) *Claybricks & Tiles Sdn Bhd lwn Tenaga Nasional Bhd* [2007] 1 MLJ 217; [2006] 4 CLJ 892;

(ii) *Marwin Industries Sdn Bhd v TNB* (Civil Appeal No J-02(NCVC)-3147–12 of 2011) (unreported);

D (iii) *Nikmat Maju Development Sdn Bhd v Tenaga Nasional Bhd* [2015] 4 MLJ 502;

(iv) *Tenaga Nasional Berhad v Ternakan Air Wui Kyee Sdn Bhd* [2015] MLJU 2136; [2015] 5 CLJ 955; and

E (v) *Ichi-Ban Plastic (M) Sdn Bhd v Tenaga Nasional Bhd* [2014] 6 MLJ 461.

[13] The root cause of the confusion in understanding the true meaning of s 38 of the Act is because of the words, 'offence committed' which appear in s 38(3) of the Act. TNB's stand is that conviction is not a precondition before F it can pursue its claim for loss of revenue under s 38(3) of the Act. The consumers held the opposite view. They contended that TNB must first obtain a conviction of an offence under s 37(1), (3) or (14) of the Act before it can pursue its claims for loss of revenue under s 38(3) of the Act.

G **[14]** To date, there is no direct decision of the apex court on the issue as to whether a prior conviction is a precondition under s 38(3) of the Act before TNB can pursue its claims against the consumer for loss of revenue due to the commission of an offence under s 37(1), (3) or (14) of the Act.

H **[15]** In *WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd* [2012] 4 MLJ 296; [2012] 4 CLJ 478, this court, in the course of its judgment on the issue as to whether the decision of TNB is amenable to judicial review, did express the view that:

I > ... Section 38 of the Act empowers the respondent to discontinue the supply of electricity based on the *subjective finding* of employee if any offence has been found committed under s 37(1), (3) or (14). (Emphasis added.)

[16] In short, it is the employee of TNB and not the court, who decides,

based on his own subjective opinion whether or not an offence under s 37(1), (3) or (14) of the Act has been committed. The issue in that case was whether the decision of TNB in disconnecting the supply of electricity to the consumer under s 38(1) of the Act could be quashed by way of a judicial review application. It was held that under O 53 of the Rules of the High Court 1980, only a decision made by a public authority, was amenable to judicial review. The relationship between TNB and the consumer was a commercial or contractual relationship, which was in the nature of a private relationship. The Federal Court in that case affirmed the decision of the courts below that the decision of TNB in disconnecting the electricity supply was not open to judicial review.

[17] In *AWP Enterprise Sdn Bhd* the Kuala Lumpur High Court preferred to follow the decisions of the Penang High Court in *Dai-Ichi Electronics (M) Sdn Bhd v Tenaga Nasional Bhd* and the Shah Alam High Court in *Tenaga Nasional Berhad (dahulunya Lembaga Letrik Negara Tanah Melayu) v Star Polymer Sdn Bhd (dahulunya Luen Mei Plastic Industries Sdn Bhd)* which held that there must be a prior conviction of an offence under s 37(1), (3) or (14) of the Act in order for TNB to pursue its claim for loss of revenue under s 38(3) and before it could rely on s 38(4) and (5) of the Act. As the consumer in that case had not been charged and convicted of an offence under s 37(1), (3) or (14) of the Act, TNB was not entitled to rely on a written statement under s 38(4) of the Act. In the result, TNB's claim was dismissed with costs.

[18] The High Court in *AWP Enterprise Sdn Bhd* declined to follow the decisions of the High Courts in *Leong Hup Poultry Sdn Bhd v Tenaga Nasional Bhd* and *Tan Yeong Kim v Tenaga Nasional Berhad* and the decision of the Court of Appeal in *Claybricks & Tiles Sdn Bhd lwn Tenaga Nasional Bhd* which held that conviction under s 37(1), (3) or (14) of the Act was not a precondition before TNB could pursue its claims for loss of revenue from electricity supplied to the consumer, holding that those cases were decided on s 38(1) and not on s 38(3) of the Act.

[19] The decision of the High Court in *AWP Enterprise Sdn Bhd* was however set aside by the Court of Appeal. It held that a conviction under s 37 of the Act was not a necessary precondition to a claim under s 38(3) of the Act. It was of the view that to construe s 38(3) of the Act as contended by the consumer would result in an absurdity as the consumer would not be obliged to pay for the consumption of electricity if it was not convicted of an offence under s 37 of the Act. Section 38(3) itself uses the word 'committed' and not convicted. Thus proof of tempering was only on a balance of probabilities and not beyond reasonable doubt.

A SUBMISSIONS BEFORE THIS COURT

[20] Learned counsel for *AWP Enterprise Sdn Bhd* submitted that s 38(3) and (4) must be read together with s 37 of the Act. Both ss 37 and 38 are contained in Part IX of the Act under the title 'Offences and Penalty'. Thus, a written statement under s 38(4) can only be used as a prima facie evidence against the consumer in a claim for loss of revenue 'due to the offence committed' under s 37(1), (3) or (14) of the Act, as was held in *Dai-Ichi Electronics (M) Sdn Bhd v Tenaga Nasional Bhd* and *Tenaga Nasional Berhad (dahulunya Lembaga Letrik Negara Tanah Melayu) v Star Polymer Sdn Bhd (dahulunya Luen Mei Plastic Industries Sdn Bhd)*. A conviction of an offence under s 37(1), (3) or (14), of the Act is a necessary precondition before TNB can claim its loss of revenue under s 38(3) of the Act.

[21] Learned counsel for *AWP Enterprise Sdn Bhd* pointed out that the Act did not however preclude TNB claiming its losses by way of civil proceedings against the consumer where a criminal conviction had not been obtained and without relying on a written statement under s 38(4) of the Act by proving its loss on a balance of probabilities, as it did in *Tenaga Nasional Bhd v Nikmat Maju Development Sdn Bhd*. TNB could not however rely on the decisions in *WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd* and *Claybricks & Tiles Sdn Bhd lwn Tenaga Nasional Bhd* as these cases were not decided on s 38(4) of the Act.

[22] Learned counsel for TNB submitted that a conviction is not a precondition for TNB to recover its loss of revenue due to meter tempering by way of a civil action against the consumer under ss 38(3)–(5) of the Act. Both s 38(1) and s 38(3) use the word 'committed' and not 'convicted'. These words do not bear the same meaning. See *Black's Law Dictionary* on the definition of the said words for their meaning.

[23] Learned counsel for TNB relied on the following cases which held that a conviction under s 37(1), (3) or (14) of the Act was not a precondition for TNB to claim for its loss of revenue: *Goh Guan Seng (t/a MSG Ice Enterprise) v Tenaga Nasional Bhd*, *Claybricks & Tiles Sdn Bhd lwn Tenaga Nasional Bhd*, *WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd*, *Nikmat Maju Development Sdn Bhd v Tenaga Nasional Bhd* [2015] 4 MLJ 502, *Ichi-Ban Plastic (M) Sdn Bhd v Tenaga Nasional Bhd* [2014] 6 MLJ 461 and *Sumbang Projeks Sdn Bhd v Tenaga Nasional Berhad* [2014] MLJU 1813; [2014] 4 CLJ 323.

DECISION OF THIS COURT

[24] The questions of law posed to us essentially involve construction of s 38 of the Act. The differences of judicial opinion among the judges of the High

Court was basically because they construed the words 'offence committed' differently. The minority appeared to treat the words 'offence committed' as being convicted of the offence. The majority did not consider the words 'offence committed' as being convicted of the offence.

[25] The words 'offence committed' appear twice in s 38. Firstly in s 38(1) in the phrase, 'offence has been committed'. Secondly, in s 38(3). The word 'convicted' or 'conviction' is absent in s 38. The words 'committed' and 'convicted' do not bear the same meaning. *Black's Law Dictionary* defines the words 'committed' and 'convicted' as follows:

> 'committed': To perpetrate (a crime).
>
> 'convicted': To find (a person) guilty of a criminal offence upon a criminal trial.

[26] *Concise Oxford English Dictionary* (11th Ed, Revised), defines the words 'commit' and 'convict' as follows:

> 'commit': perpetrate or carry out (a mistake, crime or immoral act).
>
> 'convict': declare to be guilty of a criminal offence by the verdict of a jury or the decision of a judge in a court of law.

Factually, a consumer may have committed the offence under s 37(1), (3) or (14) of the Act but he is not yet convicted until found guilty by the court. Section 38(3) is drafted in a plain language. The cardinal rule of interpretation is that when the language used in a statute is clear effect must be given to it. In *Metramac Corp Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd* [2006] 4 MLJ 113 this court endorsed what Higgins J said in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 with regard to the rule of interpretation:

> The fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded according to the intent of the Parliament that made it, and that intention has to be found by an examination of the language used in the statute as a whole. The question is, what does the language mean; and when we find what the language means in its ordinary and natural sense it is our duty to obey that meaning even if we think the result to be inconvenient, impolite or improbable.

There is no reasonable basis whatsoever to contend that there must first be a conviction of an offence under sections 37(1), (3) or (14) of the Act before TNB can pursue its claim under s 38(3) of the Act for loss of revenue.

[27] Another reason for the conflicting views of judicial opinion was the misreading of s 38 itself. Section 38(1) and s 38(3) of the Act are interrelated. It is clear from s 38(1) and s 38(3) that the person who decides whether an offence has been committed under s 37(1), (3) or (14) of the Act is the 'person employed by a licensee'. The licensee is TNB. The finding whether an offence has been committed or not is based purely on the *subjective finding* of the

A employee (see *WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd*). If the person employed by the licensee decides that an offence under s 37(1), (3) or (14) has, in his opinion been committed, he may then require the consumer to pay for the loss of revenue. For example, if there is in his opinion, evidence of meter tempering he may then require the consumer to pay for the loss of revenue. At B that point of time, the matter had not been brought to the court.

[28] By virtue of s 38(4) of the Act, it would be sufficient for TNB to require the consumer to pay for the loss of revenue by issuing a written statement by its employee and duly certified by it or any person authorised by it stating:

C

(a) the amount of loss of revenue or expenses incurred by TNB; and

(b) the person liable for the payment thereof.

That statement constitutes prima facie evidence that payment is due and D payable. What happens if the consumer refuses to pay? TNB can then invoke s 38(5) of the Act by filing a civil action in court to recover the loss of revenue.

[29] It must be noted that ss 37 and 38 are two district sections. Section 37 is a penal provision which makes it an offence for any person who commits any E act referred to in that section, for which, if found guilty he may be punished with imprisonment or fine or both. Section 38 is a provision which enables TNB to recover its loss of revenue expeditiously without having to wait for the consumer to be prosecuted and convicted.

F **[30]** To construe s 38(3) as contended by the consumer would lead to an absurdity. First, the power to prosecute for an offence under s 37(1), (3) or (14) of the Act is vested with the public prosecutor and not with TNB. Section 42 of the Act states:

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> No prosecution shall be instituted for an offence under this Act or any regulations made under this Act except by or with the consent in writing of the Public Prosecutor.

There is no guarantee that every prosecution would result in a conviction. In the meantime, TNB's right to recover the loss of revenue would be kept in H abeyance.

[31] Secondly, TNB would not be able to recover the loss of revenue if the consumer is not prosecuted and convicted, or if the prosecution results in an acquittal, notwithstanding the fact that the consumer has benefitted from the I consumption of electricity. To put it crudely, the consumer, if acquitted would enjoy free supply of electricity at the great expense of TNB. That was certainly not the intention of the Legislature.

[32] TNB's statutory right to recover its loss of revenue under s 38(3) of the

Act is not dependent on the consumer's conviction of an offence under s 37(1), (3) or (14) of the Act. The question of disconnecting the supply of electricity under s 38(1) of the Act did not arise when there was no prior consumption of electricity or where in the opinion of the person employed by TNB, no offence was committed under s 37(1), (3) or (14) of the Act.

[33] Now, we revert to the two questions of law posed to us. Both questions relate to the construction of s 38(3) and (4) of the Act. The first question itself is flawed. It refers to a wrong provision. TNB's right to claim its loss of revenue is under s 38(3) and not s 38(4) of the Act as stated in the question. A wrong question does not require any answer. The second question concerns s 38(3) and 38(4) of the Act. Section 38(4) is a provision relating to the mode of proof where TNB makes a claim for loss of revenue under s 38(3) of the Act. A written statement by an employee duly certified by TNB or by person authorised by TNB stating:

(a) the amount of loss of revenue or the expenses incurred by TNB; and

(b) the person liable for the payment thereof,

shall be prima facie evidence of the payment that has to be made by the consumer under s 38(3) of the Act. For reasons as stated earlier in this judgment a criminal conviction of an offence under s 37(1), (3) or (14) of the Act is not a precondition for TNB to pursue its claims for loss of revenue under s 38(3) of the Act. This right is a separate right independent of its right to disconnect the supply of electricity under s 38(1) of the Act. The answer to the second question must be in the negative.

THE WRITTEN STATEMENT POINT

Introduction

The legal effect of the written statement from TNB under s 38(4) of the Act for purposes of recovery of the loss of revenue (the written statement point)

[34] The relevant questions are as follows.

Questions (d) and (e): Bright Rims

Questions (a) and (b): AWP Enterprise

(d) Whether the prima facie presumption under s 38(4) of the Electricity Supply Act 1990 arises automatically with the presentation of a written statement in accordance to the section?

(e) If question (d) is answered in the negative, in what situation does the prima facie under s 38(4) of the Electricity Supply Act 1990 arises?

Question (c): AWP Enterprise

(c) Whether a party relying on the prima facie presumption under s 38(4) of the Act is barred from proving its loss of revenue by other means in the event that it fails to prove the said prima facie presumption under s 38(4) of the Act?

Question (a), (b) and (c): Dunia Raya

(a) whether in the absence of a prescribed statutory form in s 39(4) of the Act for the written statement, it is open for TNB to issue the 'written statement' in a form that complies with the criteria in s 38(4) of the Act and the consumer is sufficiently alerted of an impending action?

(b) whether in the absence of a prescribed statutory form for the written statement under s 38(4) of the Act, notices of demand issued by TNB specifying 'the amount of loss of revenue' and 'the person liable for the payment thereof is sufficient for the purposes of s 38(4)?

(c) whether for the purposes of s 38(4) of the Act, TNB is obliged to provide the details of the written statement upon request to the Respondent prior to the trial of the matter failing which the statement is rendered inadmissible?

Question (ii): Kepala Batas Bihun

(ii) whether the respondent must produce a written statement by an employee of the respondent which is verified by the respondent or anyone who has been authorised by the respondent that has stated the amount of loss of revenue or the respondent's expenses and the person liable for payment thereof before s 38(4) of the Act can be raised against the applicant.

Decisions of the High Court and the Court of Appeal

[35] In Bright Rims, the learned trial judge accepted the written statement (exh P4) prepared by Senior Manager of TNB pursuant to s 38(4) of the Act and held that by adducing the written statement TNB had proven a prima facie case of the amount to be paid by Bright Rims. The trial judge further observed that the written statement was not conclusive based on the decision of the Court of Appeal in *Francis Phillips a/l AJ Phillips v Bank Industri Malaysia Bhd* [2004] 2 MLJ 1.

[36] In Bright Rims the learned trial judge had dismissed the TNB's claim on the ground that Bright Rims had shown, on a balance of probabilities, a manifest error in the written statement tendered by TNB in the trial.

[37] On appeal, the Court of Appeal reversed the decision of the trial judge and allowed the TNB's claim. The Court of Appeal did not however make any observation on the written statement made pursuant to s 38(4) of the Act. The Court of Appeal did not agree with the High Court's finding that Bright Rims had shown manifest error in the written statement. According to the Court of Appeal the High Court failed to appreciate not only that the major part of the estimate was not shown to be incorrect but also the alleged inaccuracy was not quantified so that the estimate can be further adjusted to arrive at the amount that can be claimed. As such there was no reason for the court to deny TNB's claim of RM2,031,328.60, the whole estimated sum.

[38] In AWP Enterprise the High Court dismissed TNB's claim against AWP Enterprise for the sum of RM443,598.72 for the electricity consumed but not billed on the ground that TNB had failed to prove the sum. In its judgment the High Court ruled that TNB was not entitled to rely on a written statement provided in s 38(4) of the Act as prima facie evidence of the amount due to TNB for loss of revenue under sub-s 38(3) of the Act as it had not been proved that AWP Enterprise had been charged and convicted of an offence under sub-ss 37(1), 37(3) or 37(14) of the Act.

[39] On appeal, the Court of Appeal allowed TNB's appeal and held that TNB had proved its claims for the amount of RM443,598.27 and the estimate was not manifestly unreasonable, excessive or wrong. With regard to the issue of whether a conviction under s 37 of the Act was a necessary precondition to a claim made under s 38(4) of the Act the Court of Appeal answered that in the negative. The Court of Appeal opined that all s 38(4) of the Act does is to enable the licensee to rely on a conviction, if any, obtained by the prosecutor, and as provided by s 38(5), to rely upon the written statement under s 38(4) as prima facie evidence of the loss of revenue suffered and the consumer liable for the payment thereof.

[40] In Dunia Raya, the High Court dismissed TNB's claim against Dunia Raya for a sum of RM1,623,987.77 on the ground that it was not proven that the meters were tampered with by Dunia Raya, the consumer. The High Court also held that TNB failed to prove its claim for the outstanding amount owed on the ground that TNB's witness did not explain how the back-billing outstanding amount was calculated.

[41] The appeal by TNB against the decision was dismissed by the Court of Appeal. The Court of Appeal agreed with the High Court that TNB had not proven its case against Dunia Raya. The Court of Appeal held that the purported statement under s 38(4) of the Act did not comply with the mandatory requirement of the law and as such TNB could not rely on the statement and initiate a civil action. It was also held that TNB had not

A independently proven liability and quantum. The Court of Appeal observed that TNB's claim was made pursuant to s 38 of the Act. The Court of Appeal opined that TNB was not deprived of making a claim for breach of contract and/or tort for loss of revenue in consequence of a tampered meter. If TNB had done so than TNB must prove that the customer tampered with the meter and
B in consequence TNB suffered loss of revenue.

[42] However, if TNB relied on s 38, they need not prove that the customer tampered with the meter. It was sufficient if TNB could show that the meter
C had been tampered with. In terms of quantum TNB could rely on certified written statement as a prima facie evidence to establish its case.

[43] In Kepala Batas Bihun, the High Court allowed TNB's claim of RM428,327.24 against the consumer for loss of revenue because the meter was
D tampered with by the consumer. In this case a written statement pursuant to s 38(4) of the Act was produced by TNB in the trial to prove the amount of loss of revenue incurred by TNB due to the meter tampering by the consumer. The written statement was prepared by TNB's employee ('SP3'), an engineer. The High Court ruled that SP3 was a qualified person under s 38(4) of the Act and
E his written statement was accepted by the court and the court held that the written statement was a prima facie evidence of the amount owed by the consumer to TNB.

[44] In its appeal to the Court of Appeal the consumer raised two main
F grounds. It contended that TNB had failed to prove that the consumer had tampered with the wiring on the floor of the premises on meter installation. Secondly, the consumer contended that the claim for loss of revenue between 14 October 2008–12 May 2011 (back-billing charges) was made without basis.
G

[45] The Court of Appeal agreed with the finding of the High Court on the first issue that the consumer's meter was tampered with. As regards the second issue, the Court of Appeal held that the High Court had correctly accepted
H evidence of SP3 and the explanation of back-billing as prima facie proof under s 38(4) of the Act. The Court of Appeal agreed with the High Court that the back-billing was reasonably computed and had not been rebutted by the consumer.

I TNB's submissions

[46] The questions framed under the 'Written Statement Point' essentially seek to determine the followings:

(a) whether the prima facie statutory presumption in s 38(4) of the Act

arises automatically upon the presentation of a written statement pursuant to the said provision;

(b) whether TNB's letter of demand is sufficient to meet the requirement of a 'Written Statement' envisaged by s 38(4) of the Act?

(c) whether TNB is barred from proving its loss of revenue using other methods in circumstances where TNB fails to prove the amount stated in the written statement? and

(d) whether s 38(4) written statement is nullified in the absence of any explanation and/or particulars of the same upon the request of the consumer.

[47] Learned counsel for TNB submitted that on a plain reading of the provision, the amount stated in the written statement becomes the prima facie evidence of amount that the consumer has to pay for the loss revenue. As long as the written statement complies with the requirement of s 38(4), the prima facie presumption would automatically take effect against the consumer that the consumer has to pay for the loss of revenue as stated in the written statement. It is thus open to the consumer to lead evidence to rebut the prima facie evidence contained in this statement.

[48] It was further submitted that in the absence of a written statement under s 38(4) of the Act TNB will not be prevented from proceeding with its recovery claims under s 38(3) of the Act as the written statement under s 38(4) is only evidentiary in nature. TNB would only lose the advantage of the presumption of a prima facie evidence but it would not lose the right of recovery given statutorily under s 38(3) of the Act.

[49] It was also submitted by learned counsel for TNB that TNB may also prove its loss of revenue using the usual methods in civil claims without relying on its s 38(4) written statement even if it had been issued. In support of that TNB cited the decision of the Court of Appeal in *Sumbang Projeks Sdn Bhd v Tenaga Nasional Berhad* [2014] MLJU 1813; [2014] 4 CLJ 323.

Submissions of learned counsel for the consumers

[50] According to learned counsel for AWP Enterprise Sdn Bhd and Bright Rims Manufacturing Sdn Bhd, resort can only be had to a written statement under s 38(4) of the Act after a criminal conviction for offences under s 37(1), (3) or (14) is obtained. In the event a criminal conviction under the said sections is not obtained, TNB can still claim its losses via civil proceedings subject to it proving loss and damage, on a balance of probabilities.

A **[51]** In Dunia Raya Enterprise Sdn Bhd the documents issued by TNB to Dunia Raya were in the form of letters of demand by its solicitor, Messrs Aziz Hon Anuar. Learned counsel for Dunia Raya Enterprise Sdn Bhd submitted that the solicitors are in no capacity to issue or certify statements on behalf of TNB, as they act on TNB's instruction.

B

[52] It was submitted by learned counsel for Dunia Raya Enterprise Sdn Bhd that s 38(4) of the Act, when interpreted literally, required the following ingredients to be present before a written statement may be said to be in compliance with the statutory provision:

C

(a) it must be a written statement by an employee of TNB specifying the amount of loss of revenue and the person liable for the payment; and

(b) the written statement must be certified by TNB or any persons authorised by TNB.

D

[53] According to learned counsel, the words 'duly certified by the licensee' in s 38(4) of the Act mean to declare, attest or endorse that the amount in the statement is true and correct. The amount or calculation of the amount claimed may only be certified by a qualified person. It is only after those requirements are complied with by TNB that the statement becomes a prima facie evidence of the payment that has to be made by the consumer.

E

[54] It was further submitted that in view of the definition of 'authorized person' under s 2 of the Act, TNB cannot delegate the task of issuing s 38 notice to its solicitors as the solicitors are not authorised persons as defined under the Act.

F

[55] It was also submitted that in view of s 38(5) of the Act, a s 38(4) notice is a precondition to any civil action brought by TNB for the loss of revenue and full and complete compliance with the criteria set out in s 38(4) of the Act should be required for a notice to be validly issued.

G

[56] Premised on the above submission learned counsel for Dunia Raya Enterprise Sdn Bhd urged this court to answer the three questions of law posed by Dunia Raya as follows:

H

Question (a):

I

Whether in the absence of a prescribed statutory form in s 38(4) of the Electricity Supply Act 1990 for the written statement, it is open for TNB to issue the 'written statement' in a form that complies with the criteria in s 38(4) of the Act and the consumer is sufficiently alerted of an impending action?

Answer:

TNB must issue the written statement complying with the criteria of s 38(4) of the Act, namely, a written statement by an employee of the TNB specifying the amount of loss of revenue and the person liable for the payment, which statement must be duly certified by TNB or its authorised person as defined in the Act. This statement must be issued before any amount may be recoverable by civil action as provided under s 38(5).

Question (b)

Whether in the absence of a prescribed statutory form for the written statement under s 38(4) of the Act, notices of demand issued by TNB specifying 'the amount of loss of revenue' and 'the person liable for the payment' thereof is sufficient for the purposes of s 38(4)?

Answer:

No. Firstly the notices of demand must be issued by TNB and not their solicitors or any other representatives and secondly, these notices must be certified by TNB as required by s 38(4).

Question (c)

Whether for the purposes of s 38(4) of the Act, TNB is obliged to provide the details of the written statement upon request to the respondent prior to the trial of the matter failing which the statement is rendered inadmissible.

Answer:

Yes. However, there was no question of the statement being rendered inadmissible in the present case, for there was at the first instance, no s 38(4) statement issued by the appellant. What was issued were solicitors' letters of demand, upon instructions from TNB. Further s 38(5) specifies that the s 38(4) statement must be first issued, and a time given for the respondent to make payment before a civil action may be instituted.

[57] Learned counsel for Kepala Batas Bihun Sdn Bhd submitted that s 38(4) of the Act required the written statement to be issued by an employee of TNB who had been duly certified by TNB or any person authorised by TNB and this must be apparent on the written statement itself.

DECISION OF THIS COURT

[58] Section 38(4) and (5) of the Act reads as follows:

A (4) A written statement by an employee of the licensee duly certified by the licensee or any person authorized by the licensee specifying —

(a) the amount of loss of revenue or the expenses incurred by the licensee; and

(b) the person liable for the payment thereof,

B shall be prima facie evidence of the payment that has to be made by the consumer under subsection (3).

(5) The amount stated in the written statement shall, within the period specified in the statement, be due and payable to the licensee and in default of payment such amount shall be recoverable by civil action in a court.

C

[59] The intention of the Parliament in enacting this provision is to give an evidential advantage to TNB. The amount stated in the s 38(4) written statement becomes the prima facie evidence of the amount that the consumer D has to pay for the loss of revenue. An observation was made by the Court of Appeal in respect of s 38(4) written statement in *Tenaga Nasional Berhad v Dunia Raya Enterprise Sdn Bhd* [2015] MLJU 2140; [2015] 6 CLJ 751 at p 756 as follows:

E (iii) section 38(3)–(5) only gives some evidential advantage to Tenaga and does not discharge the legal burden to prove its claim when quantum as well as liability is challenged. Once challenged by way of credible evidence, then the trial court is obliged to do a balancing act to see whether Tenaga has discharged the legal burden. The Court of Appeal held as follows:

F If the action is to be based purely on contract and/or tort, then Tenaga cannot rely on the statutory statement under s 38(4) of which will stand as prima facie evidence of quantum of loss of revenue. If s 38(4) is relied upon, it does not stop the defendant from challenging quantum as well as liability. Sections 38(3)–(5) only give some evidential advantage to Tenaga and do not discharge the legal burden to prove its claim when quantum as well as liability is challenged.

G

[60] In *Taiwan Chief Precision Technology Sdn Bhd (formerly known as Li Yo Electronics Sdn Bhd) v Tenaga Nasional Bhd* [2013] 4 MLJ 625; [2014] 4 CLJ 23, the Court of Appeal observed at p 631 (MLJ); p 31 (CLJ):

H [23] The s 38 Statement is 'prima facie evidence'. What does 'prima facie evidence' mean? According to *Halsbury's Laws of England*, (4th Ed, Vol 17) at p 22, para 28:

'Prima facie evidence' means evidence which, if not balanced or outweighed by other evidence, will suffice to establish a particular contention.

I [24] In that same paragraph, the meaning of 'conclusive evidence' is explained as follows:

'Conclusive evidence' means that no contrary evidence will be effective to displace it, unless the so-called conclusive evidence is inaccurate on its face, or fraud can be shown. Conclusive evidence does not mean exclusive evidence.

[25] The term 'manifest error' is another way of saying 'inaccurate on its face'.

[26] In the context of the case before us, what needed to be determined by the High Court was whether there was any evidence that balanced or outweighed the prima facie evidence of the defendant's s 38 statement. That evidence, in our view, need not necessarily be manifest error on the face of the s 38 statement. It can take the form of evidence adduced by the plaintiff or even evidence adduced by the defendant itself.

[61] As rightly observed by the Court of Appeal, the fact that the written statement is prima facie evidence does not make it conclusive against both parties. The burden shifts to the consumer to present the rebuttal evidence. The consumer is free to rebut the evidence in the forms of evidence adduced by the consumer or even evidence adduced by TNB itself.

[62] For a written statement to have the effect of a prima facie evidence it must be issued in compliance with the requirement of s 38(4) of the Act. In *Tenaga Nasional Berhad v Dunia Raya Enterprise Sdn Bhd* the Court of Appeal at p 757, held that for TNB to rely on a written statement, the following must have taken place:

(i) the appellant must have calculated the loss of revenue and reduce it into a document and written statement;

(ii) an employee and/or duly authorised person of the appellant must have perused the document as well as the written statement to certify the written statement;

(iii) the certified written statement must contain the particulars stated in s 38(4) of the ESA 1990;

(iv) for a valid certificate, the name of the employee or authorised person of the appellant must appear in the statement and duly signed;

(v) if a proper certified statement is issued, it needs to be served on the customer and if the customer does not pay, then civil action can be taken. Thus, it is a condition precedent for initiation of civil action in reliance of s 38 for Tenaga to issue a certified written statement according to law, before civil action can be commenced;

(vi) ...

[63] We observe that only learned counsel for Dunia Raya Enterprise Sdn Bhd and Kepala Batas Bihun Sdn Bhd made specific argument on this issue, namely under what circumstances the written statement is said to be in compliance with the requirement of s 38(4) of the Act.

[64] The words 'duly certified by the licensee' in s 38(4) of the Act would carry the plain and literal meaning. The *Oxford Advanced Learner's Dictionary*

A defines 'certify' as to declare something formally in writing and in the present context to declare that the amount in the written statement is true and correct. Every written statement under s 38(4) of the Act which is not certified by TNB, can be certified by any person authorised by TNB.

B **[65]** In addition, we agree with the decision of the Court of Appeal in *Tenaga Nasional Berhad v Dunia Raya Enterprise Sdn Bhd* that the written statement issued pursuant to s 38(4) of the Act by TNB must satisfy the first five conditions mentioned in that case (which are reproduced in para 62 of this judgment) in order for it to be accepted as a prima facie evidence of the payment that has to be made by the consumer.

[66] In cases where the written statement was not issued in compliance with s 38(4) of the Act, TNB loses the advantage of the presumption of a prima facie evidence but it does not lose the right of recovery given statutorily under s 38(3) of the Act. TNB however, has to prove its claim based on the civil burden and the standard of proof of balance of probabilities.

[67] For the reasons given above we would answer the relevant questions as follows:

(1) Question (d) Bright Rims and Question (a) AWP Enterprise.
The answer is in the affirmative.

(2) Question (e) Bright Rims and Question (b) AWP Enterprise.
It is unnecessary to answer these questions in view of the answer above.

(3) Question (c) AWP Enterprise.
The answer is in the negative.

(4) Question (a) Dunia Raya.
The answer is in the affirmative.

(5) Question (b) Dunia Raya.
The answer is in the negative.

(6) Question (c) Dunia Raya.
TNB is obliged to provide the details of the written statement upon request to the consumer prior to the trial. Where TNB failed to provide the information requested by the consumer, it is for the trial court to decide on a case by case basis whether to admit such written statement as evidence for TNB.

(7) Question (ii) Kepala Batas Bihun.
The answer is in the affirmative.

THE CALCULATION POINT

[68] This bring us to the calculation point, namely, whether an estimation or approximation of the loss of revenue suffered by TNB as a result of a tampered meter at the consumer's premises is precluded under s 38 claim.

[69] The relevant questions are as follows:

Question (iii): Ichi-Ban, question (b): Nikmat Maju, question (c): Bright Rims, and question (g) Dunia Raya:

(a) whether TNB's calculation of its loss of revenue due to meter tampering under s 38(4) of the ESA 1990 may be based on an approximation or estimation of the loss, as opposed to strict proof of damages for breach of contract, due to the special nature of the claim, to wit, a statutory cause of action for loss of revenue due to meter tampering? and

(b) whether the calculation employed by the respondent in proving its loss of revenue due to the said meter tampering based on the daily average consumption and sudden drop is evidence of the respondent's loss of revenue for the period of 14 October 2008–12 May 2011.

[70] The submission of learned counsel for TNB is as follows. It is crucial to appreciate that the cause of action envisaged under s 38(3)–(5) of the Electricity Supply Act 1990 is a statutory claim, where the relief stipulated thereunder is independent of any common law claim for tort or breach of contract. What is statutorily claimable by TNB under s 38(3) is the loss of revenue related to the meter tampering under s 37. The signifance of the meter is stated in s 32(1), namely, that the consumer is charged for the quantity of electricity consumed as ascertained by the meter installed at his premises. Thus, if the meter is tampered with, the basic means by which the quantity of electricity actually consumed by the consumer over a period becomes unascertainable. Learned counsel referred to the following observation by the Court of Appeal in the *Bright Rims* case:

> It is also obvious that where a meter is tampered with, there is left no accurate metering of the electricity consumed.

Learned counsel submitted that this is where TNB has to work backwards to ascertain both the period of loss and the resulting loss of revenue. Thus, learned counsel added, the observation made by the Court of Appeal in the *AWP Enterprise* case is correct and should be adopted. In that case the court observed (at paras [17] and [25]):

> [17] For the electricity supplier, it is impossible to turn back the clock and re-meter the consumption. The determination is necessarily by an estimate:

A ...

[25] In the final analysis:

(a) A consumer must pay for the electricity he consumes.

B (b) He should not be allowed to benefit from tampering of meters to pay less, as it results in the general public paying more for their electricity.

(c) Since the clock cannot be turned back to re-measure the consumption, only estimates can be made, and if such estimate is not shown to be manifestly unreasonable, excessive or wrong, it may be accepted as proof upon a balance of probabilities of the amount estimated and claimed.

C

[71] According to learned counsel, as the Act is silent on the methodology to be used by TNB to calculate the loss of revenue suffered due to meter tampering, Parliament has left the process of ascertainment to TNB because of

D the difficulties inherent in these type of claims. It is important to appreciate the reality of the situation under which the claim is made. In a meter tampering case, all the information is with the consumer because the incident takes place at his premises. In most cases, the consumer will be uncooperative. The High Court in the *Ichi-Ban* case recognised this when it observed as follows:

E

> The Legislature has taken cognisance of the fact that in a claim under s 38(3) *'the plaintiff has to work very much in the dark to figure out the loss as all particulars of the actual and real usage of the electricity is with the defendant'*.

F In the *Bright Rims Manufacturing* case, the High Court observed as follows:

> Dalam kes seperti ini di mana tenaga letrik telah dicuri, *adalah mustahil sekali untuk menjangka plaintif akan dapat mengemukakan bukti yang tepat sekali tentang jumlah kW tenaga letrik yang dicuri. Mahkamah berpendapat bahawa dalam kes-kes sebegini, anggaran tentang jumlah tenaga letrik yang dicuri sudah memadai*. Pendapat

G mahkamah ini mendapat sokongan dari peruntukan s 38(4) dan (5) Akta. Walau bagaimanapun, anggaran ini perlu dibuat dengan munasabah dan adil kepada defendan.

[72] Learned counsel argued that because of the aforesaid inherent

H difficulties, the Act lends assistance to TNB by allowing TNB's calculation of the loss of revenue due to meter tampering to be taken as prima facie evidence of the loss of revenue. It is a recognition by the legislation that the written statement issued under s 38(4) would be an estimation or approximation of the loss. That written statement constitutes 'prima facie' evidence of the loss giving

I opportunity to the consumer to challenge the calculation. It is incumbent upon the consumer to rebut the prima facie evidence with sufficient evidence to demonstrate why the amount of estimated loss of revenue as calculated by TNB is inaccurate and exactly how much the consumer is liable to pay or none at all. Reference was made to the following cases:

(a) *Sabah Electricity Sdn Bhd v Idah Bakar* [2014] MLJU 1902; [2014] 1 LNS 1444;

(b) *Tenaga Nasional Bhd lwn Arkitek Urbanisma Sdn Bhd* [2010] MLJU 2219; [2011] 10 CLJ 796; and

(c) *Tenaga Nasional Berhad lwn Rank Metal Sdn Bhd dan satu kes lagi* [2014] MLJU 1837; [2014] 1 LNS 1776.

[73] It is submitted that the fact that the loss of revenue claimed by the written statement under s 38(4) is 'prima facie' evidence only of the loss of revenue, is the surest proof that the amount is an estimation of the loss suffered by TNB which is open to the consumer to challenge. It is submitted that the realistic approach taken by the Court of Appeal in the *Bright Rims* and *AWP Enterprise* case be adopted. According to him these cases held that in a case like this it is impossible for TNB to turn the clock back and re-meter the electricity supplied. As such, TNB's calculation of its loss of revenue is necessarily an estimate and that estimate can only be rebutted if the consumer manages to show that there is a manifest error in the calculation or that the estimate is manifestly unreasonable, excessive or wrong.

[74] Learned counsel for TNB further submitted that it is well accepted in law that loss or damages need not be calculated to a point of mathematical certainty. In support, he referred to *McGregor On Damages* (19th Ed) where at para 10-002, under the chapter on 'Certainty of Damages' it is commented as follows:

> On the other hand, where it is clear that *some substantial loss has been incurred*, the fact that *an assessment is difficult* because of the nature of the damage *is no reason for awarding no damages or merely nominal damages*. As Vaughan Williams LJ put it in *Chaplin v Hicks*, the leading case on the issue of certainty. *'The fact that damages cannot be assessed with certainty does not relieve the wrong doer of the necessity of paying damages'*.

[75] Reference was also made to para 10-012 of *McGregor* where it is commented as follows:

> *A pecuniary loss may itself occasionally be difficult to assess although it is clear that it has been incurred. Thus in Biggin v Permanite*, where in an action against a seller for delivering defective goods Devlin J held that the claimant was entitled to claim damages in respect of the diminution in the market value of the goods, he further held that *it was no bar to awarding substantial damages to the claimant that it was impossible to measure precisely the amount of the market diminution*.

[76] Thus, it was submitted that TNB's calculation of its loss of revenue due to meter tampering may be based on an approximation or estimation of the loss

caused by the tampered meter, as opposed to strict proof of damages to the last dollar as in the case of recovery of damages for breach of contract.

[77] The substance of the submission of learned counsel for Ichi-Ban Plastic is as follows. The general principles of law in this country must be equally applicable to the TNB, and TNB must discharge its burden to prove its claim (in terms of liability and quantum) with no lesser burden than any plaintiff who commences an action in our courts. Section 38(3) and (5) only gives some evidential advantages to TNB and does not relieve it of the legal burden to prove its claim when quantum as well as liability is challenged. TNB has to discharge the burden of proving both the fact and the amount of damages before it could recover. If it fails to prove either the fact or the amount of damages, TNB will lose the action. If it proves the fact and damages but not its amount, TNB would be entitled to nominal damages only. Learned counsel relied on *Tenaga Nasional Berhad v Dunia Raya Enterprise Sdn Bhd*, *Tenaga Nasional Berhad v Ternakan Air Wui Kyee Sdn Bhd*, *Tenaga Nasional Bhd v Ee-Lian Plastic Industries (M) Sdn Bhd* and *Guan Soon Tin Mining Co v Wong Fook Kum* [1969] 1 MLJ 99, *Taiwan Chief Precision Technology Sdn Bhd (formerly known as Li Yo Electronics Sdn Bhd) v Tenaga Nasional Bhd* [2013] 4 MLJ 625; [2014] 4 CLJ 23, *Ong Ah Long v Dr S Underwood* [1983] 2 MLJ 324; [1983] CLJ Rep 300, *Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817 and *Sumbang Projeks Sdn Bhd v Tenaga Nasional Berhad* [2014] MLJU 1813; [2014] 4 CLJ 323. In *Sumbang Projeks* the Court of Appeal held that:

> Considering that the plaintiff was claiming such a huge amount of money as back-charges, it was incumbent on the plaintiff to adduce a more tangible, reliable and scientific method of calculation than a mere assumption based on some comparative graphs drawn by SP3 and one sudden drop in electricity usage/consumption on a particular date.

[78] In the case of *Bright Rims Manufacturing*, its learned counsel submitted that the Court of Appeal misdirected itself when it held as follows:

> [14] ... It is also obvious where a meter is tampered with, there is left no accurate metering of the electricity consumed. To require of the estimate to prove the amount claimed upon a balance of probabilities defeats the acceptance that it may be proved by an estimate. Herein lies the sting: to require too high a standard of proof defeats the estimate and rewards the consumer who tampered with the meter. The wisdom of doing so is so questionable that justice cannot possibly require such a standard. The inequity is equally obvious, for such consumer comes not with clean hands. Justice must necessarily hold that in the balance of justice, it must be the consumer who tampered with the meter who must bear the risk of having to pay more rather than the licensee to take a loss not because it was unable to prove the tampering but because it could not meet the high standard required from the estimate.

[15] The reasoning that the respondent had proved a manifest error upon a balance of probabilities is equally flawed. It is the amount claimed that has to be proved upon a balance of probabilities. A claim for backbilled sums due to meter tampering is necessarily based upon an estimate. That estimate is accepted unless it is demonstrated that there is manifest error. It is a question of whether there is or there is not a manifest error. That there is upon a balance of probabilities a manifest error is insufficient to elevate conjecture to a demonstration of manifest error.

[16] We examined why the High Court considered that manifest error was proved upon a balance of probabilities. We concluded it came from the fact that the document D2 referred to in para 67 of the grounds was produced at the trial by the witness, without the appellant having had an opportunity to check and verify it as to its accuracy. It purported to be prepared from the respondent's records of its operations. Its production was objected to. In a contest between the appellant licensee's estimate and the document generated by the consumer who tampered with the meter, the balance must favour the licensee.

[17] A further consideration is this. In para 67 of the grounds, the High Court referred to a reply by PW3 and stated that the answer could not be understood and was of no assistance to the court. The issue raised with PW3 was his failure to make adjustments on various holidays and days when night shift was not working. The cross-examination merely elicited the shortcomings but did not go on to establish how much that shortcoming amounted to. But the High Court, ignoring that except for the shortcomings where on certain days the estimates erred, the whole estimated sum of RM2,031,328.60 was rejected in toto. There was a failure to appreciate not only that the major part of the estimate was not shown to be incorrect, but also the alleged inaccuracy was not quantified so that the estimate can be further adjusted to arrive at the amount that can be claimed. We accept it is not for the court to calculate the correct amount for an order, but it is equally true it is not for the appellant and respondent to establish by how much the estimate is to be corrected. The respondent not having elicited from PW3 what the adjustment should be for those days where the factory was not working full time or night shifts, there was no reason to deny an order for the RM2,031,328.60 as claimed. This is particularly so when D2 was produced only at the defence stage of the case.

[79] It was contended that the Court of Appeal's finding as aforesaid was not supported by authority and departed from the cardinal rule in civil proceedings, namely, that it is for the plaintiff to prove its loses, and in the event that the presumption applies, the burden shifts onto the defendant to rebut the same on the balance of probabilities.

[80] In *Nikmat Maju Development Sdn Bhd*, in respect of the first question, its learned counsel submitted that the loss of revenue under s 38(4) should be based on strict proof damages as construed by the Court of Appeal.

[81] In *Dunia Raya Enterprise Sdn Bhd*, its learned counsel submitted that there is no necessity or purpose for this court to answer the question posed, because the questions merely relate to the sets of facts in this appeal. Specifically

on the first question posed, learned counsel submitted that this question need not be answered by this court as TNB failed to satisfy the requirements under s 38(4) to enable it to rely on the prima facie evidence. In any event, he contended that the answer to the question should be in the negative as TNB must also discharge its evidential burden of proof on the quantum of its claim. He added that there must be corroboration on the accuracy in TNB's calculation and it was incumbent on TNB to adduce a more tangible, reliable and scientific method of calculating the quantum.

[82] In *Kepala Batas Bihun Sdn Bhd*, in respect of the second question, its learned counsel submitted that the method of calculation used by TNB was in itself 'manifestly unreasonable, excessive and wrong'. He argued that if this method of calculation was considered sufficient evidence, then there would be no safeguard for the consumer. TNB will always choose the period of consistent and high usage of electricity to calculate its loss of revenue.

DECISION OF THIS COURT

[83] The first question raised the issue as to the nature and extent of the evidence necessary to establish a claim under s 38 of the Act. Given the nature of the claim for the loss of revenue in this case, the question raises the issue of certainty or otherwise of the loss and how to measure it. Although pecuniary loss have been incurred, it may be difficult to assess it. However, the fact that assessment is difficult due to the nature of the damage is no reason of awarding no damages or nominal damages. In *Biggin & Co Ld and another v Permanite, Ld, Berry Wiggins & Co Ld (third parties)* [1951] 1 KB 422, in action against a seller for delivering defective goods the court held that claimant was entitled to claim damages in respect of the dimunation in the market value of the goods. It was also held that where the market value was the measure of damages, the absence of precise evidence of it was no ground for awarding nominal damages only. The court must determine the damages as best as it could. In his judgment Devlin J said at pp 433–439:

> It seems to me that one can very rarely arrive at an accurate figure of unsound value. Where the breach is non-delivery, there is often a market price which can be quoted, or evidence can be given of the price at which at the relevant date similar goods were changing hands, but there is rarely any market price for damaged goods, since their value depends on the extent of the damage. If the actual damaged goods are sold with all faults, good evidence can be obtained of the difference in value, but such a sale is not always possible, and a claim for substantial damages cannot be limited to goods which have been sold. Moreover, damage may arise from two sources. Suppose that goods are delivered which are inherently defective in breach of the contract of sale and that they are further damaged by negligent handling in breach of the contract of carriage, and that in their damaged condition they fetch 70 per cent of their sound value. Is the plaintiff to recover nominal damages only because he cannot prove against either defendant what part of the depreciation in value was

due to his acts? It is one thing to say, as I have said, that this is the sort of situation which parties in contemplating the measure of damage would be glad to avoid, and it is another thing to say that it is one which must necessarily result in an injured plaintiff obtaining no satisfaction. *I think that in such a situation the court is bound to do the best that it can*. It is no more difficult to estimate a plaintiff's loss in such circumstances than it is to estimate the loss of earning power caused by physical disablement. The third parties submit that the latter case is entirely different. I do not think the fundamental principle on which damages are awarded for breach of warranty of quality, namely, that it 'is the estimated loss directly and naturally resulting in the ordinary course of events from the breach of warranty', is any different in principle. *It is only that where precise evidence is obtainable, the court naturally expects to have it. Where it is not, the court must do the best it can.* In *Chaplin v Hicks* (15), Vaughan Williams LJ, said:

> In the case of a breach of a contract for the delivery of goods the damages are usually supplied by the fact of there being a market in which similar goods can be immediately bought, and the difference between the contract price and the price given for the substituted goods in the open market is the measure of damages; that rule has been always recognized. *Sometimes, however, there is no market for the particular class of goods; but no one has ever suggested that, because there is no market, there are no damages. In such a case the jury must do the best they can, and it may be that the amount of their verdict will really be a matter of guesswork. But the fact that damages cannot be assessed with certainty does not relieve the wrong-doer of the necessity of paying damages for his breach of contract*.

Fletcher Moulton LJ, said much the same thing in his judgment.

[84] The approach in *Chaplin v Hicks* [1911] 2 KB 786, the leading case on the issue of certainty, and *Biggin & Co Ld and another v Permanite, Ld, Berry Wiggins & Co Ld (third parties)* were applied by the court in *Zabihi v Janzemini and others* [2009] All ER (D) 357 (Jul); [2009] EWCA Civ 851. In *Zabihi*, the valuation of missing converted jewellery was in issue. The brief facts revealed in the judgment of the court are these. The claimant, Mr Zabihi, and the first defendant, Mr Janzemini are both members of the Iranian community resident in London. On 12 September 2002, Mr Zabihi handed to Mr Janzemini four sets of jewelry comprising matching necklace, earrings, ring and bracelet (though one of them may have lacked the bracelet) in order that Mr Janzemini might sell them on behalf of Mr Zabihi. Shortly thereafter Mr Zabihi left London on a business trip to Iran. (His return to London was delayed until February 2006 due to some unexplained problems with the government in Iran.) A few weeks after his departure Mr Zabihi rang Mr Janzemini and was told by him that the jewelry had been stolen. Mr Zabihi put the matter in the hands of solicitors, Shaidy & Co, who wrote to Mr Janzemini on 30 January and 28 February 2003 and 13 January 2004. Mr Janzemini did not respond to any of them. After his return from Iran Mr Zabihi instructed new solicitors, who wrote to Mr Janzemini on 11 May 2006 demanding compensation for the loss of the jewelry. Mr Janzemini did not respond to that letter either. On

20 June 2006 the claim form in this action was issued. At paras 277–280 of his judgment Blackburne J, described the problems which arose before him:

> 277. That still leaves the question: if the jewellery which was handed over was not the proffered jewellery then what was it and how is it to be valued?
>
> 278. [Counsel for Mr Janzemini] submitted that if I should reject Mr Zabihi's detailed account, by reference to the Zandieh letter, of what the jewellery comprised, and also Mr Janzemini's, the court could not properly find that the jewellery handed over was of some other quite different kind (what he described as 'a third set'). To do so, he said, would be to find that it was of a nature and appearance which Mr Janzemini would not have had the chance to consider and comment upon in the witness box.
>
> 279. The logic of [Counsel for Mr Janzemini]'s approach is that, given my findings of fact, Mr Zabihi's claim must be dismissed or, at most, he should recover no more than nominal damages on the footing that, *although he has established that his jewellery was converted, he has failed to establish what his loss is that flows from the conversion*.
>
> 280. I do not accept that my conclusions must lead to that result. *[Counsel for Mr Zabihi] submitted, by reference to a passage from McGregor on Damages (17th Ed), para 8-002, that the court must do its best on such evidence as it feels able to accept to place some kind of value on jewellery which, on this footing, Mr Janzemini would be shown to have converted even if its precise identity cannot be established and therefore its value must be in doubt. Otherwise, he submitted, Mr Zabihi would end up establishing that conversion of his jewellery had occurred yet would fail to recover anything in damages, other possibly than nominal damages, because of an inability to establish exactly what it was that he had handed over. I see great force in that*.

[85] The Court of Appeal agreed that Blackburne J was right to do his best to come to a valuation figure provided that he was entitled to accept the evidence on which he relied as sufficient evidence of value. This is what the Court of Appeal said at paras 26–29 of its judgment:

> 26. I turn then to the second ground. There are two limbs to it, namely para 8-002 of *McGregor on Damages* (17th Ed) which the judge relied on in para 280 of his judgment and the decision in *Armorie v Delamirie* (1721) 1 Strange 505 to which he referred in para 285 *counsel for Mr Janzemini contends that the judge was wrong to adopt and apply either*.
>
> 27. The relevant passages in *McGregor on Damages* (17th Ed) are in the following terms:
>
> > 8-001. A claimant claiming damages must prove his case. To justify an award of substantial damages he must satisfy the court both as to the fact of damage and as to its amount. If he satisfies the court on neither, his action will fail, or at the most he will be awarded nominal damages where a right has been infringed. If the fact of damage is shown but no evidence is given as to its amount so that it is virtually impossible to assess damages, this will generally permit only an award of nominal damages: ...

> 8-002. On the other hand, where it is clear that some substantial loss has been incurred, *the fact that an assessment is difficult because of the nature of the damage is no reason of awarding no damages or merely nominal damages*.

Later, after reference to the judgment of Vaughan Williams LJ in *Chaplin v Hicks*, the editors refer to the judgment of Devlin J in *Biggin v Permanite* [1951] 1 KB 422, 438 that:

> *Where precise evidence is obtainable, the court naturally expects to have it [but] where it is not, the court must do the best it can.*

The editors continue:

> Generally therefore although it remains true to say that 'difficulty of proof does not dispense with the necessity of proof the standard demanded can seldom be that of certainty.

28. Counsel for Mr Janzemini contends that the judge was wrong not to insist on proper proof of loss by Mr Zabihi by establishing exactly what was handed over and adducing expert evidence as to its value. He contends that this case does not fall into any of the eight categories listed later in Chapter 8 of *McGregor on Damages*. He suggests, in effect, that the judge was wrong to have done his best on the material available.

29. I do not think that this part of the second ground is separate from the third ground comprising grounds 3–5 both inclusive. The judge's reliance on the statements in *McGregor* were distilled into the principle stated in paragraph 280 that:

> the court must do its best on such evidence as it feels able to accept to place some kind of value on jewellery which, on this footing, Mr Janzemini would be shown to have converted even if its precise identity cannot be established and therefore its value must be in doubt.

If the judge was entitled to accept the evidence on which he relied as sufficient evidence of value then no one can doubt that he was required to do his best. If it was not sufficient evidence of value then the judge's conclusion was wrong for that reason; not that he should not have tried to do his best.

[86] Reverting to the issues raised relating to the calculation point, due to the nature of the claim, we appreciate that there may be difficulty in obtaining the evidence for the claim under s 38 of the Act. Nevertheless, in our view, it would be unwise for us to use this occasion to say anything which might be taken as specifying or limiting the nature and extent of the evidence necessary to establish a claim for loss of revenue under s 38 of the Act. Where precise evidence is available, as for example if there is a special device to measure the loss of revenue due to the tampering of electricity supply, naturally the court expects to have it, but where it is not the court must do the best it can. In other words, there could be other evidence in lieu of precise evidence. For example, approximation or estimation may be used provided it is reasonable and fair. This would depend on the quality of the evidence adduced in court to support

A that approximation or estimation. In light of what we have said thus far, we find it unnecessary to answer the two questions posed.

THE BENEFIT/UNJUST ENRICHMENT POINT

B *Whether the rationale behind s 38 enabling TNB to recover the unrecorded consumption of electricity by the consumer due to a tampered meter is the unjust benefit enjoyed by the consumer*

C DECISION OF THIS COURT

[87] TNB is a public listed company and is the sole licensee under the Act. As a licensee, TNB is responsible for supplying, operating and installing electricity to the consumer. Section 2 of the Act defines 'consumer' as a person
D who is supplied with electricity or whose premises are for the time being connected for the purpose of supply of electricity by a supply authority or a licensee. For the purpose of electricity supply, TNB installs a meter at the consumer's premises to measure the quantity of electricity consumed and 'the quantity of electricity (is) ascertained by the meter' (see s 32(1), (2) and (3) of
E the Act). TNB and its consumers enter into an agreement, which would, inter alia, provide for the obligation of TNB to supply electricity and the consumer's corresponding obligation to pay for the electricity supplied pursuant to the agreed contractual tariff.

F **[88]** The legal relationship between TNB and its consumer is purely commercial, which is defined by the contract of supply for electricity. This court in the case of *WRP Asia Pacific Sdn Bhd v Tenaga Nasional Berhad* [2012] 4 MLJ 296 explained the private relationship in the following words:

G > The respondent, which was corporatized under a privatisation scheme, is owned by many different persons including the government and has acted like any limited company under the Companies Act 1965 in the circumstances of the case (*Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors* [2006] 5 MLJ 60; [2006] 1 CLJ 927). The respondent here had established a private relationship with the appellant when they mutually signed a contract of supply. This relationship thus
H > was commerce-based, with the appellant as the consumer, and the respondent the energy supplier company. The respondent would expect the appellant to keep its part of the bargain by not tampering with the electricity meter that would cause losses to it.

I **[89]** In order to detect meter tampering and reduce the loss of revenue caused by it, TNB conducts periodical inspections at the premises of its consumers where the electricity meter installations are located. During these inspections, TNB's inspection teams visually inspect the electricity meter installations for evidence of tampering. If evidence of tampering is discovered,

the inspection team records the discovery in a meter inspection form. As a result of the tampering, the meter could not function properly and had failed to record the actual usage of the electricity supplied by TNB, which resulted in undercharges of electricity usages. TNB brings civil claims for recovery of loss of revenue from the consumers under s 38(3)–(5) by reason of meter tampering.

[90] Section 38(3) has created an entirely new statutory cause of action for TNB for recovery of loss of revenue in cases of meter tampering. It is a specific right explicitly given under statute to claim from the consumer the loss of revenue it has suffered due to the meter tampering. Further, under reg 3(1) of the Licensee Supply Regulations 1990, TNB may recover from a consumer any charges due to it in respect of the supply of electricity. It is pertinent to note that it is not a claim in contract or tort. This is a civil claim claiming money under statute for loss of revenue, where the claim is made independently of a wrong in tort or breach of contract (see *McGregor on Damages* (20th Ed, 2018) at para 1-007). In *Government of Malaysia v Lim Kit Siang; United Engineers (M) Berhad v Lim Kit Siang* [1988] 2 MLJ 12, Salleh Abas LP explained that a cause of action is a statement of facts alleging that a plaintiff's right, either at law or by statute, has, in some way or another, been adversely affected or prejudiced by the act of a defendant in an action. The phrase 'cause of action' has also been referred to as '... simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person' (see *Letang v Cooper* [1965] 1 QB 232, per Lord Diplock).

[91] Section 38(3) of the Act sets out the general principle to be applied in the monetary award for TNB's loss of revenue. The words in s 38(3) are clear and explicit. The guiding principle is set up in these terms: the statutory claim by TNB is specifically for loss of revenue due to the offence committed under sub-ss 37(1), (3) and (14) and any reasonable expenses directly incurred by the licensee under this section including expenses incurred in respect of the reconnection of electricity supply. The statutory cause of action created and authorised by the Act is for the benefit of TNB. The provision was enacted explicitly for the safeguarding of TNB's interest. Had it not been for s 38(3), it is clear that TNB could not have a statutory right to bring the civil action against the customer for recovery of loss of revenue. So long as TNB can prove there are acts of tampering under sub-ss 37(1), (3) and (14), TNB may pursue a civil action to recover the losses. TNB's statutory cause of action to recover for loss of revenue is only within the four corners of s 38(3). The intention of Parliament is distinctly apparent: in order to entitle TNB to the judgment of the court for the recovery of revenue under s 38(3), it would be necessary for TNB to prove meter tampering and loss of revenue by reason of tampering. The measure of the award for the statutory cause of action is itself the creature of the Act and is to be found in the provision, and nowhere else. For that

reason, the determination of what is the rationale behind s 38 would not help resolving TNB's statutory claim to recover for loss of revenue.

[92] Whilst the claim by TNB is based on statutory cause of action, the burden rests still on TNB to prove both liability and, assuming liability was established, to prove the quantum of the loss of revenue. It is for TNB to prove its case and satisfy the court that its claim is well founded before the court grants judgment on the claim (see *Syarikat Kemajuan Timbermine Sdn Bhd v Kerajaan Negeri Kelantan Darul Naim* [2015] 3 MLJ 609; [2015] 2 CLJ 1037). It is in this context, specific provisions in the Act provide assistance and aid to TNB to prove both these elements. Pursuant to s 38(4), the written statement issued by TNB, shall be prima facie evidence of the payment that has to be made by the consumer. Should the consumer fail to pay the amount stated in the written statement, TNB can recover the same by a civil action. Such amount due shall be recoverable by civil action in court pursuant to s 38(5) for recovery of loss of revenue.

[93] In the context of the question posed, another important point to notice is that TNB's statutory claim under s 38(3) is not a claim based on a cause of action in unjust enrichment or unjust benefit that give rise to a right to restitution. In this respect, learned counsel for TNB submitted that the legislative intent behind TNB's right to the loss of revenue under s 38(3)–(5) is to ensure that the consumer is not unjustly enriched by being able to enjoy the electricity supplied by TNB without having pay in full and that the provision is premised on the principle of unjust enrichment. To support his submission, he specifically referred to the speech of Lord Wright in the House of Lords case of *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1942] 2 All ER 122, where at p 135 Lord Wright said:

> It is clear that any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognized to fall within a third category of the common law which has been called quasi-contract or restitution.

[94] It is very important to understand the context in which Lord Wright made the remark above. The case of *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* was referred to by this court in the case of *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441; [2015] 2 CLJ 453, where this court had recognised an independent cause of action in unjust enrichment. In that case this court observed that the theoretical foundation of the right to restitution remedy as it is understood today is that it is founded on the law of unjust enrichment, which fall outside the domains of contract and

tort. In underlining the significance of the law of unjust enrichment in relation to all the rights of the parties to a contract, the court said:

> This is a good place to point out that remedies for contractual disputes are generally compensatory in nature, with damages assessed based on the loss suffered by the claimant. Restitutionary remedies, on the other hand, focus on any unjust enrichment to a party at the claimant's expense. It is aimed of restoring that enrichment to the claimant. It is clear on principle and on authority that the idea of justice behind this aim is that no one should be made richer through loss to another.

In *Goff & Jones on The Law of Unjust Enrichment*, para 1-08, it is stated:

> Whatever may be the underlying moral justifications for the award of restitution in all these cases, the 'unjust' element in 'unjust enrichment' is simply a 'generalisation of all the factors which the law recognises as calling for restitution'. In other words, unjust enrichment is not an abstract moral principle to which the courts must refer when deciding cases, it is an organizing concept that groups decided authorities on the basis that they share a set of common features, namely that in all of them the defendant has been enriched by the receipt of a benefit that is gained at the claimant's expense in circumstances that the law deems to be unjust. The reasons why the courts have held a defendant's enrichment to be unjust vary from one set of cases to another, and in this respect the law of unjust enrichment more closely resembles the law of torts (recognising a variety of reasons why a defendant must compensate a claimant for harm) than it does the law of contract (embodying the single principle that expectations engendered by binding promises must be fulfilled).

Restitution simply means that a party who has received a benefit must restore the benefit received by him. The theoretical foundation of the right to restitution remedy as it is understood today is that it is founded on the law of unjust enrichment, which falls outside the domains of contract and tort. The law of contract/tort and the law of unjust enrichment are conceptually distinct. Unjust enrichment describes a cause of action. On the other hand restitution describes a remedy. Restitution as a response to wrongdoing is therefore a different topic from restitution as a response to unjust enrichment (see: *Goff & Jones on The Law of Unjust Enrichment* para 1-04). The courts have found it necessary to make available, independent of the law of contract and civil wrongs, for the restoration of benefits on the grounds of unjust enrichment.

As stated by Lord Wright in *Fibrosa Spolka Akcyjna Appellants; And Fairbairn Lawson Combe Barbour Limited Respondents* [1943] AC 32 at p 61:

> It is clear that any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derive from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognised to fall within a third category of the common law which has been called quasi-contract or restitution.

Since then English law has recognised an independent law of unjust enrichment by

A recognising a claim for restitution based on unjust enrichment. According to *Goff & Jones on The Law of Unjust Enrichment* (see para 1-05), the highest courts have now conclusively recognised that unjust enrichment is a distinct source of rights and obligations in English private law that ranks alongside contract and civil wrongs in importance and accordingly calls for discrete stand- alone treatment.

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[95] In another part of the judgment in *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd*, this court discussed the requirements that must be fulfilled to make out a cause of action in unjust enrichment as follows:

C The principle underlying the cases of *Banque Financiere de la Cite v Parc (Battersea) Ltd* and *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v IRC* is that, in the context of the present case, a cause of action in unjust enrichment can give rise to a right to restitution where it can be established that:

(a) the plaintiff must have been enriched;

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(b) the enrichment must be gained at the defendant's expense;

(c) that the retention of the benefit by the plaintiff was unjust; and

(d) there must be no defence available to extinguish or reduce the plaintiff's liability to make restitution.

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Nearer home, there is now no longer any question that unjust enrichment law is a new developing area of law which is recognised by our courts. That the principle of unjust enrichment is the basis to justify an award of restitutionary relief can be seen in *Sediperak Sdn Bhd v Baboo Chowdhury* [1999] 5 MLJ 229; [1999] 5 CLJ 31 and in *Air Express International (M) Sdn Bhd v MISC Agencies Sdn Bhd* [2012] 4 MLJ 59; [2012] 4 CLJ 581. Nevertheless, it has to be said that despite the increase in judicial reference to the expression of unjust enrichment to justify an award of restitutionary reliefs, the law of unjust enrichment is still in its formative stage in our jurisdiction (see article entitled *An Introduction to the Law of Unjust Enrichment* [2013] 5 MLJ i by Alvin W-L See). In our view, the time has come for this court to

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G recognise the law of unjust enrichment by which justice is done in a range factual circumstances, and that the restitutionary remedy is at all times so applied to attain justice.

[96] Coming back to the present appeals, as an alternative or in addition to

H the statutory cause of action under s 38(3) of the Act for recovery for loss of revenue, TNB is similarly entitled to legally pursue the claim based on a cause of action in unjust enrichment. If TNB elects to pursue relief for unjust enrichment then, as is a matter of settled law, there must be a proper and specific plea in the statement of claim that its cause of action is so founded.

I Further, material particulars that give rise to unjust enrichment must be provided in the pleadings. In this regard, it is a well-settled legal principle that the court should not decide on an issue that was not pleaded by the parties. Parties are required to set out the factual bases of their respective cases in the pleadings. The most important purpose of pleadings is to plead reasonable

cause of action, define the issues of fact and questions of law to be determined by the court (see *Saiman bin Umar v Lembaga Pertubuhan Peladang and another appeal* [2015] 6 MLJ 492). Pleadings enable both parties to know in advance the averments being made against them so that they will not be taken by surprise during the trial. Tellingly, in the present appeals TNB did not plead that its cause of action was founded on the law of unjust enrichment. Unjust benefit was not a pleaded issue. With respect, the submission on the benefit/unjust enrichment question by learned counsel for TNB is, therefore, misconceived.

[97] As a result, for all the reasons set forth above and in the circumstances of these appeals, it is unnecessary to answer the benefit/unjust enrichment question as framed.

THE ESTOPPEL POINT

[98] We come to the estoppel point, with the question whether estoppel arising from delay applies to nullify a s 38 claim. In respect of this point, the question of law allowed by this court reads as follows:

> Whether an estoppel can be raised against TNB for not acting promptly upon a suspicion of meter tampering?

[99] The fact situation that gave rise to the question as stated in the written submissions for Nikmat Maju is as follows: TNB had been monitoring Nikmat Maju's premises through its remote monitoring system and had discovered purported discrepancy in relation to the use of electricity. After more than a year of monitoring, on 17 July 2008 TNB conducted an inspection at Nikmat Maju's premises. Nikmat Maju contended that the loss (if any) sustained by TNB was directly caused by its own inaction when it waited for over a year to take action despite being aware that there was a discrepancy in Nikmat Maju's use of electricity.

[100] Learned counsel for TNB and Nikmat Maju are on common ground that this question is fact based. The question pre-supposes a set of facts in relation to the issue of knowledge of the alleged tampering and delay. For this reason, learned counsel for Nikmat Maju has urged this court to deal with this issue in the appeal proper.

[101] For TNB, learned counsel urged this court to answer this question in the context of TNB's statutory right to claim for loss of revenue by way of civil action as provided under s 38(5) of the Act.

A DECISION OF THIS COURT

[102] Having considered the submissions, we are persuaded by learned counsel for TNB to answer the question in the context proposed.

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[103] Learned counsel for TNB submitted that estoppel does not apply when its effect is to stop TNB from enforcing its statutory right under the Act. In support, learned counsel relied on the case of *Public Textiles Berhad v Lembaga Letrik Negara* [1976] 2 MLJ 58; [1976] 1 LNS 120. In that case, the C defendant pleaded estoppel as a defence. The High Court held that Lembaga Letrik Negara (as TNB was known then) was not estopped from claiming the amount that had been undercharged by Lembaga Letrik Negara ('LLN'). The trial judge held that to admit estoppel would have the effect of nullifying statutory provisions of the Electricity Act 1949.

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[104] At the Federal Court, the issue was when can estoppel be pleaded against a public corporation. In its judgment, the Federal Court referred to the case of *Maritime Electric Co Ltd v General Dairies Ltd* [1937] 1 All ER 748; [1937] AC 610 which, according to the Federal Court, enshrined 'a true legal E principle that estoppel cannot be set up to hinder the performance of a statutory duty'.

[105] In *Maritime Electric*, General Dairies Ltd bought from the Electric Company electric energy. To arrive at the correct amount of electric energy F supplied it was necessary to multiply the meter dial reading by ten but owing to a mistake on the part of the Electric Company that was not done over a period of 28 months, with the result that during that time General Dairies were charged with only one-tenth of the electric energy supplied to them. The bills were duly paid by General Dairies. Thereafter, the Electric Company G discovered its mistakes and made further demands for those past years by supplementary bills. When General Dairies failed to pay those bills, Electric Company brought the suit to recover the balance of nine-tenths. General Dairies pleaded estoppel. It was held by the Privy Council that the Electric Company was not estopped from recovering the sum claimed. The Privy H Council said that where the Act was enacted 'for the benefit of a section of the public, and in such a case where the statute imposed a duty of a positive kind it was not open to General Dairies to set up an estoppel to prevent it. An estoppel is only a rule of evidence, and could not avail to release the Electric Company from an obligation to obey the statute, nor could it enable General I Dairies to escape from the statutory obligation to pay at the scheduled rates. The duty of each party was to obey the law'.

[106] In delivering the judgment of the Federal Court, Raja Azlan Shah FJ (as HRH then was) said:

The principle on which the decision rests is that a corporation cannot indirectly do, by placing itself under the disability of estoppel, what it could not have directly done by reason of statutory prohibitions.

[107] In construing the Electricity Act 1949 His Lordship said as follows:

... The true test, as it seems to me, is the principle of public interest, that is, whether looking at the Act as a whole and particularly at the relevant provisions, it is framed for the benefit of some third party, or the state or public at large or a section of it. We need to ascertain where the duty is imposed, for whose benefit it is imposed and why it has been imposed. The point has been canvassed in *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] 1 MLJ 49; [1963] 1 LNS 61.

[108] In *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] 1 MLJ 49; [1963] 1 LNS 61, the Privy Council had occasion to consider *Maritime Electric Co*'s case with reference to the plea of estoppel in the face of a statute. The Privy Council said:

The respondent has invoked in support of its defence a principle which appears in our law in many forms, that a party cannot set up an estoppel in the face of a statute. Thus a corporation upon which there is imposed a statutory duty to carry out certain acts in the interest of the public cannot preclude itself by estoppel in pais from performing its duty and asscerting legal rights accordingly. See *Maritime Electric Co Ltd v General Dairies Ltd* [1937] 1 All ER 748; [1937] AC 610. Given a 'statutory obligation of an unconditional character' it is not open to the Court to allow the party bound by that obligation to be barred from carrying it out by the operation of an estoppel.

[109] Applying the test, the Federal Court found that the Electricity Act 1949 is enacted to give the Board the sole monopoly to generate, distribute and sell electric energy at reasonable prices. The Federal Court said:

It has a duty to perform — to assess the appellants for rates in accordance with Tariff E of the First Schedule to the Rules, no more, no less, for electricity actually supplied. Equally, the appellants have a corresponding duty to perform — to pay at scheduled rates, no more and no less, for electricity energy actually consumed. That is a statutory obligation for which the Board is responsible to the Minister who is in turn responsible to Parliament. To waive the payment at scheduled rates is 'prohibited not by the express or implied prohibition of the legislature but by the doctrine of ultra vires'. In other words, if the plea of estoppel is allowed, the scheduled rates due in respect of the actual amount of electric energy supplied which are not irrecoverable, for it has been sued, would be indirectly remitted which the Board could not by any act directly remit. That would be nullifying the statutory provisions of the Act.

[110] We respectfully adopt the decision of this court in *Public Textiles Berhad v Lembaga Letrik Negara*.

[111] Hence in answer to the question posed before us, we find that the defence of estoppel cannot be raised against TNB in a claim instituted under s 38 of the Act.

Order accordingly.

Reported by Afiq Mohamad Noor